

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

BRIAN A. MCVEIGH et al., )  
Plaintiffs, )  
v. ) CIVIL ACTION NO. CV-09-0685-S  
CALLAN ASSOCIATES, )  
INCORPORATED et al., )  
Defendants. )

**BRIEF IN RESPONSE TO THIS COURT'S SEPTEMBER 12TH ORDER**

Defendants Rhumbline Advisers, Earnest Partners, LLC, Acadian Asset Management LLC, Western Asset Management Company, Principal Global Investors, LLC, INTECH Investment Management LLC, Turner Investment Partners Incorporated, and C.S. McKee, L.P. (collectively referred to herein as the “Asset Managers”) file this brief in response to this Court’s September 12th Order (Doc. No. 91) on the issue of the applicability of *Ex parte Callan*, \_\_\_ So.3d \_\_\_, 2011 WL 3963007 (Ala. Sept. 6, 2011) to this case. As detailed in this brief, the Alabama Supreme Court’s *Ex parte Callan* decision is applicable to one of the grounds for dismissal of this case – the failure of plaintiffs to make a pre-suit demand.<sup>1</sup> If, however, the Court determines that the *Ex parte Callan* decision does not dispose of all of plaintiffs’ claims, then this case nevertheless should be dismissed in light of the wide array of additional grounds for dismissal argued by the Asset Managers.

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<sup>1</sup> On September 23, 2011, plaintiff filed an application for rehearing in *Ex parte Callan*.

## PROCEDURAL BACKGROUND

On April 8, 2009, plaintiffs filed a complaint. (Doc. No. 1.) Defendants filed motions to dismiss. (Doc. Nos. 16, 17, 23, 24, 26.)

On July 27, 2009, this Court entered an Order (Doc. No. 39) requiring additional briefs addressing the plaintiffs' right to assert claims relating to the PACT program under applicable Alabama trust law, the PACT statutes and the PACT contracts between the named plaintiffs and the PACT Board.

In response to this Court's July 27, 2009 Order, the defendants filed the following briefs:

1. Asset Managers' Joint Supplemental Brief in Support of Their Motion to Dismiss on the Standing Issues Set Out in the Court's July 27, 2009 Order (Doc. No. 43) ("Asset Managers' Joint Supplemental Brief").
2. Defendant Callan's Memorandum of Law in Support of Its Motion to Dismiss Because Plaintiffs Lack Standing (Doc. No. 45).
3. Asset Managers' Joint Supplemental Reply Brief in Support of Their Motion to Dismiss on the Standing Issues Set Out in the Court's July 27, 2009 Order (Doc. No. 48) ("Asset Managers' Joint Supplemental Reply Brief").
4. Defendant Callan's Reply in Support of Its Motion to Dismiss Because Plaintiffs Lack Standing (Doc. No. 51).

On August 26, 2009, Callan Associates, Inc. ("Callan") moved this Court to stay all proceedings pending the disposition of the Petition for Writ of Mandamus ("Mandamus Petition") that Callan had filed with the Supreme Court of Alabama in the *Perdue v. Callan* state court case ("Perdue") (Doc. No. 54) ("Motion to Stay"). According to Callan's Motion to Stay, the Mandamus Petition "raise[d] threshold jurisdictional issues closely similar to those that Callan and the other defendants have raised in their motions to dismiss."

With its September 14, 2009 Order (Doc. No. 61), this Court granted Callan's Motion to Stay and stayed this civil action until the Alabama Supreme Court ruled on Callan's Mandamus

Petition in the *Perdue* case. The Order also stated that, following the issuance of the Alabama Supreme Court's opinion in the *Perdue* case, this Court would "enter a briefing schedule, allowing the parties to fully brief the applicability or non-applicability of the *Perdue* decision on the current action." In its contemporaneous Memorandum Opinion (Doc. No. 60), this Court explained that, "[a] ruling on whether the *Perdue* plaintiff has standing to bring her claims would be highly material and informative to any standing ruling as to the *McVeigh* Plaintiffs. . . . If the *Perdue* plaintiff is not found to have standing by the Alabama Supreme Court, the issue of standing in this case may nevertheless be well-informed by the *Perdue* standing decision." Doc. No. 60, p. 5. This Court concluded that this *McVeigh* action would be stayed "in the interests of efficiency and the conservation of the limited resources of the parties and the court" until the Alabama Supreme Court rules on Callan's Mandamus Petition in the *Perdue* case. *Id.* at p. 6.

On September 9, 2011, Callan filed a Notice of Decision by the Supreme Court of Alabama on Callan's Petition for Writ of Mandamus (Doc. No. 90).

On September 12, 2011, this Court entered a Text Order directing the parties "to file briefs regarding the applicability or inapplicability" of the Alabama Supreme Court's Opinion in *Ex parte Callan* (Doc. No. 91).

#### **APPLICABILITY OF EX PARTE CALLAN AS GROUNDS FOR DISMISSAL OF THIS CASE**

In *Ex parte Callan*, the Alabama Supreme Court held that a beneficiary of a PACT contract could not sue Callan without first making a presuit demand on the PACT Board. Callan's motion to dismiss plaintiff's claims argued, among other things, that plaintiff "lacks 'standing' to sue because she failed, before filing the underlying complaint, to first demand that the PACT board sue Callan." *Id.* at \*3. The Alabama Supreme Court agreed with Callan's position that plaintiff's "failure to first demand that the PACT Board file an action deprived her

of the ability to initiate the underlying action.” *Id.* The Alabama Supreme Court also acknowledged that, “the principles regarding a presuit demand” in a shareholder derivative action and an action by the beneficiary of a trust “are analogous.” *Id.* at \*5, n.5. The Alabama Supreme Court ruled that, “it has not been demonstrated that a demand on the PACT board that it pursue claims against Callan would have been so futile as to bring this case within [an] exception [to the presuit demand requirement].” *Id.* at \*5. “In consideration of the foregoing,” the Alabama Supreme Court “grant[ed] Callan’s petition and issue[d] the requested writ directing the trial court to dismiss [the plaintiff’s] claims against Callan.” *Id.* at \*6.

In its September 14, 2009 Memorandum Opinion, this Court explained that in the *Perdue* case and this case, “the issue of plaintiffs’ failure to make a demand on the PACT Board is pursued as a defense.” *McVeigh* Doc. No. 60, p. 6.<sup>2</sup> The Alabama Supreme Court’s *Ex parte Callan* decision is applicable to that ground for dismissal of this case. Because the Plaintiffs in this case do not allege that they made a demand on the PACT Board before initiating this civil action, this case should be dismissed for the same reason that the Alabama Supreme Court dismissed the *Perdue* case in its *Ex parte Callan* decision. *See* Asset Managers’ Joint Supplemental Reply Brief (Doc. No. 48), pp. 8-11.

#### **ADDITIONAL GROUNDS FOR DISMISSAL**

If, however, this Court determines that any of plaintiffs’ claims survive the Defendants’ presuit demand defense, then this case should still be dismissed given the multiple other grounds presented by the Defendants. Specifically, the Asset Managers argued the following additional grounds for dismissal:

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<sup>2</sup> *See* Asset Managers’ Joint Supplemental Reply Brief (Doc. No. 48), pp. 8-11; Callan’s Reply in Support of Motion to Stay (Doc. No. 58), at 3-4, ¶ 4.

1. Plaintiffs cannot meet their burden of demonstrating that they have standing to pursue their claims against the Asset Managers as required by Article III of the U.S. Constitution.
2. Assuming Plaintiffs could establish Article III standing, their claims are clearly not ripe for adjudication as they have not suffered any injury in fact.
3. Plaintiffs have failed to plead each of the elements of the causes of action that they list in their Complaint.
4. Plaintiffs have failed to exhaust their administrative remedies.
5. The asserted claims go beyond the contractual remedies to which the Plaintiffs are limited.
6. Plaintiffs do not have the right to assert PACT-related claims under any “beneficiary of the PACT Trust Fund” argument.
  - a. The sole beneficiary of the PACT Trust Fund is the PACT Program, not the Plaintiffs.
    - i. The PACT Program is the statutorily intended beneficiary.
    - ii. Comparing the ACES Program to the PACT Program demonstrates that the Legislature could have – but *did not* – make Purchasers of PACT contracts beneficiaries of the PACT Trust Fund.
  - b. Only the PACT Board can bring suit against a third party for conduct that allegedly damages or depreciates the corpus of the trust.
7. Plaintiffs do not have the right to assert PACT-related claims against the Asset Managers under the PACT Contracts entered into between Plaintiffs and the PACT Board.
8. Plaintiffs do not have the right to assert PACT-related claims under the contracts between the Asset Managers and the PACT Board on behalf of the PACT Program.
9. Plaintiffs lack third-party beneficiary standing.
10. Plaintiffs lack standing here as they are not beneficiaries of the PACT Trust Fund.
11. Even if Plaintiffs could assert some form of beneficiary status with regard to the PACT Trust Fund – entitling them to bring claims against a *trustee*

- Plaintiffs lack standing here as the Asset Managers are not trustees of the PACT Trust Fund.
  - a. The Asset Managers are not “Designated Trustees.”
  - b. The Asset Managers are not “trustees *in invitum*” or “trustees *de son tort*.”

*See* Asset Managers’ Motion to Dismiss (Doc. No. 16) and supporting brief (Doc. No. 17); Asset Managers’ Joint Supplemental Brief (Doc. No. 43); Asset Managers’ Joint Supplemental Reply Brief (Doc. No. 48).

## **CONCLUSION**

The Alabama Supreme Court’s *Ex parte Callan* decision provides grounds for dismissal of this civil action and is applicable to that extent. There are, however, additional grounds for dismissal of this civil action, as detailed in the Asset Managers’ Motion to Dismiss and supporting briefs. This civil action should be dismissed.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2011, I electronically filed the foregoing Brief in Response to this Court's September 12th Order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF registrants.

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